The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BARBARA DANIEL, individually, Plaintiff, v. THE BOEING COMPANY, a foreign corporation; VICKI KNIGHTON; and JOHN AND JANE DOES 1-5, Defendants.	Case No. 2:09-CV-00890 RSL **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** **NOTE ON MOTION CALENDAR: AUGUST 27, 2010**

I. INTRODUCTION

Plaintiff Barbara Daniel's Complaint against The Boeing Company ("Boeing") and Vicki Knighton, Plaintiff's second level supervisor, is frivolous and should be summarily dismissed. Plaintiff's causes of action are either: (1) time barred, (2) preempted by federal law, or (3) insufficient because Plaintiff cannot make out a prima facie case of discrimination, and Defendants' actions were the result of legitimate, nondiscriminatory business decisions.

First, Plaintiff cannot prevail on her claims of discrimination based on race. Plaintiff's claims of racial discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII") are barred as a matter of law, as Plaintiff failed to file a charge with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination based on race within 300 days of

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any alleged violation. Filing a charge with the EEOC is a mandatory prerequisite to filing suit under Title VII.

Moreover, Plaintiff cannot prove her claims of racial discrimination under RCW 49.60 and 42 U.S.C. §1981 because she cannot establish a prima facie case of discrimination. Specifically, Plaintiff alleges that Defendants discriminated against her by temporarily assigning her light duty at her same rate of pay because of her medical restrictions. However, it is clear that Plaintiff's temporary light duty assignment does not amount to an adverse employment action, and she cannot identify any employees who are not African-American who were treated more favorably. Further, Plaintiff cannot demonstrate that her temporary assignment to light duty was anything other than the product of a legitimate and nondiscriminatory business decision of the type routinely made by Boeing.

Second, Plaintiff's claims for age discrimination are similarly insufficient and must be dismissed. Plaintiff's claim for relief pursuant to the Age Discrimination in Employment Act of 1967 ("ADEA") fails for the same reason as her Title VII claim, namely that the claim is barred as a result of Plaintiff's failure to file a claim with the EEOC in a timely manner. Further, Plaintiff's state law claim for age discrimination fails for the same reasons as her race claim – she cannot make out a prima facie case of discrimination, and cannot demonstrate pretext in the face of evidence showing Boeing's rational business reasons for putting her on light duty.

Third, to the extent that Plaintiff claims that she was discriminated against on the basis of her gender, any such claims fail for the exact same reasons as her race and age claims. She is barred from bringing a claim under Title VII, can not make out a prima face case of discrimination, and cannot rebut Defendants' showing of a legitimate and nondiscriminatory business rationale for their decisions.

Fourth, Plaintiff cannot succeed on a claim for disability discrimination. Plaintiff's sole cause of action under the Americans With Disabilities Act ("ADA") is for a violation of Title II,

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42 U.S.C. § 12132. This section of the ADA is only applicable to public entities, and neither Boeing or Vicki Knighton is a public entity; thus, this ADA provision does not apply to Defendants and must be dismissed. Plaintiff's state law claim for disability discrimination fails for the same reasons as her race, gender and age claims.

Fifth, Plaintiff's retaliation claim fails because (a) Plaintiff's routine rotation to a different work area in the same building doing the same job and (b) her transfer to Boeing's Everett facility as the result of a layoff do not constitute an adverse employment action. Further, Plaintiff cannot demonstrate a causal link between her EEOC charge and her rotation or her transfer. In addition, Plaintiff cannot refute Defendants' legitimate business reasons for the rotation and the transfer.

Finally, Plaintiff's remaining state law claims for intentional infliction of emotional distress, negligence, negligent infliction of emotional distress, and negligent hiring, retention and supervision are preempted as a matter of law under the Labor Management Relations Act ("LMRA").

II. STATEMENT OF MATERIAL FACTS

A. Plaintiff's Employment with Boeing.

Plaintiff has worked at Boeing intermittently since 1978. Declaration of Beth Finch ("Finch Decl.) ¶ 4. Since she was rehired after a layoff in 2005, she has worked as a Materials Processor/Requirements Facilitator ("MPRF"). *Id.* Plaintiff's job, which involves retrieving parts for airplane mechanics from different parts of the facility, requires her to be able to walk 3-6 hours per shift, which is defined by Boeing as "Frequently." Declaration of Vicki Knighton ("Knighton Decl.") ¶ 6; Declaration of Sherri Wilson ("Wilson Decl.") ¶ 4. Plaintiff testified that her job description, including the walking requirement, was accurate. See, Transcript of Deposition of Daniel ("Tr."), attached to the Decl. of Silverstein as Exhibit 1, at pages 31:21-32:2.

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Boeing's Renton and Everett sites are considered to be part of the Puget Sound Region. Knighton Decl. ¶ 8. Union employees are frequently moved between sites in the Puget Sound region. *Id.* Plaintiff has worked at both the Everett and Renton locations, and in fact worked in Everett for some time before transferring to Renton in March of 2006. Finch Decl. ¶ 5. All of the events that Plaintiff complains of in this lawsuit took place during her tenure at the Renton facility, which ended in April of 2009, when she was transferred to Everett. Declaration of Wesley Costa (hereinafter "Costa Decl.") ¶ 22. Ex. 2 to Costa Decl.

While Plaintiff was in Renton between 2006 and 2009, her second level supervisor was Vicki Knighton. Knighton Decl. ¶ 5. After January 5, 2007, Plaintiff's immediate supervisor was Wesley Costa. *Id.*, Costa Decl. ¶ 4. While Plaintiff interacted with Ms. Costa on a daily basis, she rarely had any contact with Ms. Knighton. Knighton Decl. ¶ 7; Costa Decl. ¶ 5. In fact, Ms. Knighton only recalls speaking to Plaintiff on one or two occasions outside of team meetings where she would address many employees at once. Knighton Decl. ¶ 7.

B. Plaintiff's Placement on Light Duty.

Parking is at a premium at the Renton Boeing facility. Jeffery Decl. ¶ 4. If an employee does not have an "inside the gate" parking permit, he or she must walk approximately one mile to the actual facility from the general employee parking lot. *Id.* Boeing Medical has the ability to issue a tiered, or "inside the gate" parking pass on a case by case basis to employees who present a Washington State disabled license or placard accompanied by a Washington State registration letter or identification card. *Id.* ¶ 5. Plaintiff was issued a Tier 1 parking pass based on her presentation of a Washington placard to Boeing Medical. *Id.* ¶ 6. Plaintiff has had the Tier 1 Parking Pass since 2000. *Id.*

Because parking passes were issued to employees who were unable to walk to the facility from the parking lot, a Tier 1 parking pass would generally be issued with a medical restriction limiting the employee's walking to "occasional," or 1-3 hours a day. Jeffery Decl. ¶ 7; Ex. 1 to

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Jeffery Decl. The presumption of "occasional" walking could be overcome if an employee's healthcare provider provided Boeing Medical with information explaining that the employee did not have a walking restriction, but needed the parking pass for some other reason. Jeffrey Decl. ¶ 8. It appears that Plaintiff had a Medical Restriction of "May Occasionally Walk" as of January 17, 2007, however this restriction did not come to Ms. Costa's attention until late 2007, when she was asked to review a job analysis for Plaintiff. Costa Decl. ¶ 5; Jeffery Decl. ¶ 9. Ms. Costa agreed with the job analysis that was prepared and presented to her indicating that Plaintiff must "frequently" walk. Costa Decl. ¶ 5. As Plaintiff's Job Analysis required her to walk "frequently," but her medical restriction only allowed to her walk "occasionally," Ms. Costa became aware at this point that there was a conflict between the medical restriction and the job requirement. *Id.* ¶ 6.

As a result of this inconsistency, Boeing held several meetings with the goal of keeping Plaintiff in her position as an MPRF. *Id.* ¶ 7; Wilson Decl. ¶ 7. In those meetings, Plaintiff was told repeatedly that if she did not agree with her medical restriction she should follow up with Boeing Medical and her healthcare provider. Wilson Decl. ¶ 8. However, while the wording of Plaintiff's medical recommendations changed periodically over the next year based on notes sent to Boeing Medical by Plaintiff's physician, the wording of those notes never allowed Boeing Medical to give her a medical restriction less restrictive than "May Occasionally Walk." Jeffrey Decl. ¶ 9-14.

At a meeting held on June 24, 2008, Plaintiff was informed that if her medical restriction was not removed, she would be assigned to light duty until she could safely do the essential functions of her job. Wilson Decl. ¶ 11. Plaintiff did not provide Boeing Medical with any new documentation from her doctor rescinding the "occasional" walk medical restriction; consequently, she was assigned to light duty as of that day. Jeffery Decl. ¶ 9-12; Wilson Decl. ¶ 11.

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After Plaintiff was assigned to light duty, Boeing continued to work with her in an attempt to return her to her regular job. Wilson Decl. ¶ 12. While Plaintiff's Disability Management representative and Vocational Rehabilitation Consultant continued to stress to Plaintiff that she needed to clarify her medical restrictions with Boeing Medical, they also explored with other Boeing employees whether Plaintiff could use a scooter or bicycle to help her do her job, despite Plaintiff's steadfast assertions that she did not want, or need, any accommodation. *Id.* ¶ 9-10. It was determined that such an accommodation was precluded because a scooter or bicycle could not safely navigate the narrow isles in the areas when Plaintiff is required to retrieve parts (there is already a scooter and bicycle available to all employees to travel long distances between sites). *Id.* No MPRF is allowed to use a scooter or bicycle to retrieve parts because of the safety issues. Wilson Decl. ¶ 10; Costa Decl. ¶ 8.

Finally, on January 15, 2009, as Plaintiff admits, Plaintiff's physician faxed updated information to Boeing Medical stating that he wished to clarify his recommendation, and that he did not restrict Plaintiff to "may occasionally walk." Jeffery Decl. ¶ 15, Jeffery Ex. 6; Tr. 58:3-61:3. After receiving the note, Dr. Gonzalez-Dilan from Boeing Medical contacted Plaintiff's physician by telephone and spoke to him about Plaintiff's medical restrictions. Jeffery Decl. ¶ 16, Jeffery Ex. 7. As a result of his conversation, Dr. Gonzalez-Dilan issued instructions that Plaintiff's medical restriction be removed, and that she keep her parking pass. Jeffery Decl. ¶ 17; Jeffery Ex. 8. Plaintiff admits that after Boeing spoke to her doctor, she was returned to her previous job. Tr. 89:9-13; Costa Decl. ¶ 10, Costa Ex. 1. She never lost her parking pass, and still has it today. Tr. 90:2-4, 100:20-21.

During Plaintiff's temporary assignment to light duty, she worked the same shift, and had the same title that she had prior to being put on light duty. Costa Decl. ¶ 9; Finch Decl. ¶ 7; Tr.

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86:7-8, 118:22-23. Her salary actually increased while she was on light duty, from $27.50 per hour to $28.88 per hour.[1] Finch Decl. ¶ 6.

C. Plaintiff's Placement on a Different "Barge."

It is a common practice at Boeing to rotate employees, and managers are responsible for making sure that their employees are trained in all of the aspects of their jobs. Knighton Decl. ¶ 9. As a result, Ms. Knighton requires that managers under her supervision rotate employees through different areas regularly. *Id*. ¶ 9; Costa Decl. ¶ 11. Ms. Costa used Plaintiff's return to full duty as an opportunity to rotate Plaintiff and a co-worker to different areas in the same building (or, as Boeing calls it, a different "Barge"), because while Plaintiff would be doing exactly the same job, each barge serves a different part of an airplane's building cycle and requires gathering different parts. Costa Decl. ¶ 12; Knighton Decl. ¶ 10-11. Thus, working on different barges increases a MPRF's job knowledge and her value to Boeing. Knighton Decl. ¶ 11. Moving employees from barge to barge was not unusual, and Plaintiff testified that "they do rotate from time to time", and that, in fact, during her career she had been "put on every barge there is." Tr. 123:4-6; 120:16-17; Costa Decl. ¶ 11-12; Knighton Decl. ¶ 9-10.

Plaintiff's job on the two barges was exactly the same, and neither barge is more "desirable." Costa Decl. ¶ 13-14; Knighton Decl. ¶ 10. While Plaintiff complained that her new barge was "busier," as Plaintiff admits, there are employees that prefer different barges including the barge to which she was assigned, and employee preferences do not govern work assignments. Tr. 120:15-121:3.; Costa Decl. ¶ 13; Knighton Decl. ¶ 10. Placement on one barge or the other is neither a punishment or a reward, and MPRFs are expected to be able to perform their duties wherever they are assigned. Costa Decl. ¶ 13-14; Knighton Decl. ¶ 10. Indeed, Plaintiff performed her job duties satisfactorily on both barges, Costa Decl. ¶ 14; and confirmed in her deposition that she "thinks she did well" on the new barge. Tr. 139: 19-21.

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[1] The pay increase was due to her Collective Bargaining Agreement, not her assignment to light duty. Finch Decl. ¶ 6.

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D. Plaintiff's Transfer to Everett.

Approximately three months after Plaintiff returned to her job as an MPRF, Boeing had to downsize and thus entered a "surplus" situation, which means that due to budgetary reasons certain job codes were required to reduce (layoff) some of their employees. Costa Decl. ¶ 15; Finch Decl. ¶ 8. Fortunately, while Renton was required to eliminate MPRF positions as part of the surplus, Everett was in need of MPRFs, so it was possible to transfer, rather than lay off, certain of the MPRFs. Costa Decl. ¶ 16; Finch Decl. ¶9. Ms. Costa was instructed to recommend two employees for transfer to Everett. Costa Decl. ¶ 16; Finch Decl. ¶ 10.

Plaintiff admits that she has no idea how employees are chosen as possible candidates for transfer during a surplus. Tr. 206:3-207:1 In fact, the procedure is simple and unbiased, and done pursuant to policy and procedure set by Boeing's Skills Team for each region. Finch Decl. ¶ 10-11.

Ms. Costa had never been through a surplus since becoming a manger. Costa Decl. ¶ 17. Thus, she needed instruction regarding the Skill Team procedure for identifying MPRF candidates for transfer from the second shift. *Id.* Consequently, she went to Human Resources. *Id.*; Finch Decl. ¶ 10. Beth Finch, in Human Resources, explained the process for choosing employees to Ms. Costa. Costa Decl. ¶ 18; Finch Decl. ¶ 11. Specifically, Ms. Finch explained pursuant to the Skill Team policies and processes, the two employees chosen had to be the two who were not in danger of being laid off (called "safe seniority" date) who lived the closest to the Everett location, which Ms. Finch determined by city and zip code. Costa Decl. ¶ 19-20; Finch Decl. ¶ 11. In addition, they could not be team leaders or union stewards. Costa Decl. ¶ 19; Finch Decl. ¶ 11. Based solely on those preset criteria, Ms. Finch told Ms. Costa that the two employees whose folders would automatically be sent to Everett were those of the Plaintiff and one other employee, Susan Watts. Costa Decl. ¶ 20; Finch Decl. ¶ 12.

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After the folders were sent over, Everett chose Plaintiff over the other employee.[2] Costa Decl. ¶ 21; Finch Decl. ¶ 13. Neither Ms. Costa, Ms. Knighton or any other Renton employee had any discretion in deciding who would be chosen as the transferee, which was determined wholly by Everett. Costa Decl. ¶ 21; Finch Decl. ¶ 13; Knighton Decl. ¶ 14. After Everett chose Plaintiff, Ms. Costa was informed and, in turn, informed Plaintiff of her impending transfer. Costa Decl. ¶ 22. Plaintiff has been reassigned to the Everett facility since April 17, 2009. Costa Decl. ¶ 22; Costa Ex. 2 (Hourly Notice of Reassignment Due to Surplus).

E. Plaintiff Is a Union Employee Whose Employment is Governed by a CBA

Throughout her tenure at Boeing, Plaintiff has been (and was at all relevant times) a member of the International Association of Machinists and Aerospace Workers, ALF-CIO. Tr. 38:1-3; Declaration of Amy Kelly ("Kelly Decl.") ¶ 5. Copies of the Sections of the CBA pertinent to this motion are attached to the Kelly Decl. as Exhibits 1 and 2 ("CBA"). As such, at all times, Plaintiff's employment with Boeing has been governed by a Collective Bargaining Agreement. Kelly Decl. ¶ 5. Plaintiff admits that she was aware that the union had a right to file a grievance on her behalf if the Union believed that the CBA had been violated. Tr. 147:24-148:4

Plaintiff admits that she chose not to grieve certain issues that she complains of now, such as the assignment of overtime, and being assigned to a different barge when she returned from light duty. Tr. 149:18-20, 152:2-10. While Plaintiff testified in her deposition that she thinks she pursued the grievance procedure in connection with her placement on light duty and her transfer to Everett, Tr. 40:10-16, 150: 8-22, 151:8-10, 134:9-135:2, Plaintiff is mistaken. Kelly Decl. ¶ 9. She did not exhaust her administrative remedies regarding either of these matters, or any other matter during Plaintiff's tenure at Renton. Kelly Decl. ¶ 8-9.

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[2] Ms. Costa's sole contact with Everett regarding the candidates was that she informed Everett that Ms. Watts did not know a particular system of inventory, which Ms. Daniel was familiar with. Costa Decl. ¶ 21.

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F. Plaintiff's EEOC Complaint

On July 18, 2008, shortly after being assigned to light duty, Plaintiff filed a charge of disability discrimination with the Washington Human Rights Commission, which was then assigned to the EEOC. Silverstein Decl., Exhibit 2. Plaintiff's charge alleged that she was "discriminated against because I have a disability, in violation of the Americans With Disabilities Act." *Id.* Other than her claim of disability discrimination, there is no mention of discrimination based on age, race, gender, or any other protected class. *Id.* In a Determination issued on January 29, 2009, the EEOC determined that Boeing's reassignment of Plaintiff to light duty was in violation of the Americans With Disabilities Act of 1990. Silverstein Ex. 3, Significantly, by the time the EEOC issued its determination, Plaintiff's doctor had removed Plaintiff's walking restriction (the reason for the light duty assignment), and Boeing had already reassigned Plaintiff to her previous position which had been the basis for the Plaintiff's EEOC charge. Silverstein Ex. 3, Costa Decl. ¶ 10, Costa Ex. 1. While it appears, obviously, that the EEOC did not agree with Boeing's decision to assign Plaintiff to light duty, the EEOC determination does not explain how Boeing should have addressed the discrepancy between Plaintiff's medical restriction of "may occasionally walk," and the job requirement of "frequent" walking, which was, in fact, resolved by her physician.

III. STATEMENT OF ISSUES

1. Are Plaintiff's Title VII and ADEA claims time barred because she failed to file a complaint with the EEOC?

2. Should the Court grant summary judgment dismissal in favor of Defendants on Plaintiff's state claims of discrimination on the basis of race, gender, age and disability, and her 42 U.S.C. §1981 claim?

3. Should the Court Dismiss Plaintiff's ADA Claim based on 42 U.S.C. § 12132 as a matter of law because Defendants are not public entities?

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4. Are Plaintiff's claims for intentional infliction of emotional distress, negligence, negligent infliction of emotional distress, and negligent hiring, retention and supervision are preempted as a matter of law under the Labor Management Relations Act?

IV. EVIDENCE RELIED UPON

The evidence relied upon in support of Defendants' Motion for Summary Judgment is as follows: (1) Declaration of Joanna M. Silverstein, and exhibits attached thereto; (2) Declaration of Vicki Knighton; (3) Declaration of Wesley Costa, and exhibits attached thereto; (4) Declaration of Nancy Jeffrey, and exhibits attached thereto; (5) Declaration of Sherri Wilson; (6) Declaration of Beth Finch; (7) Declaration of Amy Kelly and exhibits attached thereto; and (8) the records and files herein.

V. AUTHORITY

A. Summary Judgment Standard

Summary judgment is appropriate when, viewing the facts in the light most favorable to the non-moving party, there is no genuine issue of material fact that would preclude the entry of judgment as a matter of law. As the moving party, Defendants "bear the initial responsibility of informing the district court of the basis for its motion." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(c). Because Defendants satisfy this burden, they are entitled to summary judgment if Plaintiff fails to designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324. Plaintiff must present "significant probative evidence tending to support her claim or defense." *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient," and factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

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Assuming *arguendo* Plaintiff could establish a prima facie case of discrimination or retaliation, Defendants must then offer a nondiscriminatory reason for their actions. As demonstrated throughout this brief, Defendants had legitimate, nondiscriminatory reasons for their actions. Once Defendants carry their burden of producing evidence of a nondiscriminatory/nonretaliatory reason for their actions, the presumptions created by Plaintiff's prima facie case disappear. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 892 (9th Cir. 1994). To overcome a motion for summary judgment, Plaintiff must thereafter show that the "articulated reason is pretextual 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

B. Plaintiff Cannot Establish a Claim of Discrimination Based on Race

Plaintiff's Complaint alleges violations of Title VII of the Civil Rights Act of 1964 ("Title VII").[3] Title VII requires all potential plaintiffs to file a charge of discrimination with the EEOC (or a state agency such as the Washington Human Rights Commission) within a specified period after the allegedly unlawful conduct occurred before initiating a civil action. *Love v. Pullman Co.*, 404 U.S. 522, 523 (1972); 42 U.S.C. § 2000e-5(e); 29 U.S.C. § 626(d). If the employee does not submit a timely EEOC charge, he or she may not proceed to court. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 623-24, 127 S.Ct. 2162 (2007). While the applicable deadline for filing a charge with the EEOC depends on a variety of circumstances, the latest possible filing date is 300 days after the last allegedly unlawful act. See 42 U.S.C. § 2000e-5(e)(1).

Plaintiff never filed a charge for discrimination based on race; rather, Plaintiff's only charge, filed on August 4, 2008, alleges *only* disability discrimination. See, Silverstein Ex. 2.

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[3] Plaintiff does not specify if the Title VII claim is for race, gender or disability; however, the basis does not matter – all are time barred and must be dismissed.

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As the last date of any allegedly discriminatory act that Plaintiff complains of is her placement on light duty, and she was removed from light duty in January of 2009, she has failed to timely file a charge of discrimination Under Title VII and cannot now proceed to court on those Claims. Thus, Plaintiff's claims for Title VII discrimination should be dismissed.

1. Plaintiff Cannot Establish a Prima Facie Case of Race Discrimination under Washington Law.

To prevail in a discrimination suit brought under RCW 49.60, such as the Plaintiff claims here, Plaintiff must show that she (1) belongs to a protected class, (2) suffered an adverse employment action, (3) was doing satisfactory work, and (4) was treated differently than someone not in the protected class. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 468, 98 P.3d 827 (2004). Unless a prima facie case of discrimination is established, the defendant is entitled to prompt judgment as a matter of law. *Tx. Dep't of Cmty. Affairs* 450 U.S. 248 at 254. As shown below, Plaintiff provides no evidence that any of the actions taken by Boeing or Ms. Knighton occurred because of her race. Further, Plaintiff cannot show that she suffered an adverse employment action, and cannot demonstrate that any employee outside of her protected category received better treatment than she did.

a. Plaintiff's Light Duty Assignment Was Not an Adverse Employment Action.

First, Plaintiff cannot identify any actionable adverse employment action taken by Boeing or Ms. Knighton. The law requires "an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action." *Robel v. Roundup Co*rp., 148 Wn.2d 35, 74 n.24, 59 P.3d 611 (2002). An adverse employment action, therefore, is more than an "inconvenience or alteration of job responsibilities." *Kirby,* 124 Wn. App. 454 at 465 (quoting *DeGuiseppe v. Vill. of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995)). As the court explained in *Tyner v. DSHS*, transferring an employee to an alternate assignment in accordance with an organization's policies is not an

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adverse action where the employee "was not subject to any permanent loss of pay or benefits, was not demoted or fired, and did not have her job responsibilities permanently altered" as a result of the reassignment. 137 Wn. App. 545, 564; 154 P.3d 920 (2007); see also *Donahue v. Central Washington University*, 140 Wn. App. 17, 163 P.3d 801 (2007)(changed job responsibilities without demotion or reduction in pay was not an adverse employment action).

As an initial matter, Plaintiff states very clearly in her Complaint and in her deposition testimony that being rotated to a different barge and transferred to Everett are alleged to be retaliation, not discrimination. Complaint at § 4.9; Tr. 74:16-22, 139: 9-11. Consequently, plaintiff's only allegation of discrimination and likely alleged "adverse employment action" is her temporary assignment to light duty. While it is true that Plaintiff was unhappy about being assigned to light duty for her own safety because of her medical restrictions, her title remained the same and her pay increased. All that changed was her job responsibilities, which does not amount to an adverse employment action.

In any event, Plaintiff specifically contradicted her allegation that her placement on light duty was because of her race in her deposition. Specifically, she testified that "I believe I was put on light duty because they were angry that [she went on leave for a] L&I accident." Tr: 114:3-7. She went on to state:

> Q: So what is your basis for believing that you were placed on light duty because you went out on a Labor and Industries related injury?
>
> A: I just feel that they were angry because I got hurt on the job.

Tr. 115:7-11, 115:25-116:15. When confronted with the fact that she had earlier testified that she said she was assigned to light duty on account of her race, Plaintiff could only muster a "That too." Tr. 115:14-18.

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b. Plaintiff Cannot Demonstrate that Any Employees Outside of Her Protected Classes Were Treated More Favorably.

Plaintiff's discrimination claims also fail because there is no evidence that others outside of Plaintiff's race were treated more favorably. Plaintiff argues that she believes that there were Caucasian employees who were "accommodated," while she was not. See, e.g., Tr. 98:14-18, 101:24-102:7,108:15-18; 118:10-16. This argument suffers from two fatal flaws.

First, Plaintiff repeatedly states that she did not want, did not request, and did not need, to be accommodated in order to do her job. Tr. 99:9-25, 110:25-111:6. Plaintiff also stresses that the only accommodation that she ever asked for or needed was her parking pass, which she has had continuously since 2000. Tr. 99:9-25; 211:14-23. Plaintiff can not have her cake and eat it too by claiming that she did not want or need to be accommodated, and then attempt to make out a prima facie case of discrimination based on the accommodations of others.

Second, although Plaintiff did not want, need, or request an accommodation, Boeing did look into attempting to provide her with an accommodation that would help her to do her job. Specifically, Boeing investigated whether Plaintiff could be provided a personal scooter or bicycle to help her with her job duties (as Plaintiff notes, all MPRFs already have access to a truck and a bicycle to traverse long distances. Tr. 44:1-11). Boeing was unable to offer a scooter or bicycle as an accommodation, however, because the aisles where Plaintiff collects parts are too narrow to allow a scooter or bicycle to operate safely in a busy warehouse. Costa Decl. ¶ 8; Wilson Decl. ¶ 9-10. Thus, although Boeing looked into providing an alternate accommodation other than light duty, the only feasible accommodation was putting Plaintiff on a temporary light duty assignment.

Accommodation aside, Plaintiff can not identify any other examples of racial discrimination, other than "feeling different." Tr. 69:25-70:1. While she alleges that Caucasian people were allowed to work more overtime than she was, Tr. 69:23-70:1, she bases this allegation solely on her belief that there were times she asked for overtime and didn't get it. Tr.

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78:1-3. However, when asked how many times she was denied overtime based on her race, she temporized: "I didn't say it was based on my race. I said I felt I was treated differently. And perhaps it was my race, because it seemed to me that white Caucasian coworkers got treated differently than I did." Tr. 78:14-19. Plaintiff's equivocations are flatly contradicted by Boeing's strict procedure for offering overtime, which is not given where an employee "asks" for it, but is governed by the Company's collective bargaining agreements with the unions, including Plaintiff's union. Kelly Decl. ¶ 10, Kelly Ex. 2, p.31-34. Plaintiff's assertions are also contradicted by her own testimony, as she admits that overtime was voluntary, and that she was never denied overtime. Tr. 200:14-19; 201:16-19.

2. Plaintiff Cannot Establish Pretext With Respect to Defendants' Placement of Plaintiff on Light Duty.

Even if Plaintiff could establish a prima facie case of race based discrimination, which she cannot, Boeing has presented legitimate, non-discriminatory reasons for Plaintiff's placement on light duty. Plaintiff admits that she has been diagnosed with fibromyalgia. Tr. 20:21-25. According to Plaintiff, her fibromyalgia causes her severe muscle pain that makes her ache all over, and she has pain every single day. Tr. 21:1-9. Plaintiff's condition causes her to tire easily when she walks, and she is forced to take frequent breaks to rest. Tr. 24:17-25:25. This condition, and its effect on her ability to walk, is why Plaintiff was issued a parking pass – so that she would not have to walk a long distance from the parking lot to her worksite. Tr.100:1-7.

Generally, when an employee was issued a Boeing parking pass because of a medical condition, she was given an automatic "may occasionally walk" medical restriction under the Boeing Parking rules. Jeffery Decl. ¶ 7. This was a general rule that initially applied to all employees with a State placard requesting a parking pass, regardless of age, race, gender, or disability. *Id*. However, this presumption could be easily refuted on a case-by-case basis where an employee presented a note from her physician stating that the reason for her parking pass had nothing to do with her ability to walk, or, simply, that a walking limitation was not necessary.

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Id. ¶ 8. Boeing Medical explained this procedure to Plaintiff on several occasions, however, she never produced any communication from her physician that altered the "may occasionally walk" designation. *Id.* ¶ 9.

Indeed, as part of Boeing Medical's efforts to comply with Plaintiff's requests to have her medical restriction removed, Boeing sent a copy of the medical restriction form with the "may occasionally walk" restriction to Plaintiff's doctor, with a form asking him to approve or deny the designation. Jeffery Decl. ¶ 13. As Plaintiff admits, her doctor checked the "approved" box, signed the form and sent it back to Boeing.[4] Jeffery Decl. ¶ 13. Thus, Boeing had no reason to believe that Plaintiff did not have a walking restriction, other than Plaintiff's insistence, which was directly contradicted by her physician. Jeffery Decl. ¶ 13.

When Plaintiff protested her light duty assignment, Boeing gave her several months to have her physician change her medical restriction, and had several meetings with Plaintiff to explain the process and allow her to move forward with obtaining the necessary documentation from her doctor. Wilson Decl. ¶ 7-8. Plaintiff failed to have her doctor amend her restriction before she went on light duty, or, indeed, until January of 2009. Jeffery Decl. ¶ 10-15.

An employee cannot create an inference of pretext without *some* evidence that the employer's employment decisions are unworthy of belief. *Mondero v. Salt River Project*, 400 F.3d 1207, 1213-1214 (9th Cir. 2005); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996); *Lawrence v. Univ. of Texas Medical Branch at Galveston*, 163 F.3d 309, 312 (5th Cir. 1999)("The mere fact that a plaintiff believes her employer discriminated against her is insufficient to prove discrimination.") Courts are not intended as a forum for appealing lawful employment decisions simply because employees disagree with them. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 190, n. 14, 23 P.3d 440 (2001). Numerous cases affirm the principle that an employer is entitled to summary judgment where it honestly believed its reasons for the

[4] Plaintiff argues that her doctor checked the box and signed the form "in haste." P. 42:19-25; p. 54:9-11. This may well be true, but there was no way for Boeing to know that.

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employment decision, even if those reasons are shown to be “mistaken, foolish, trivial, or baseless.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002); *Kariotis v. Navistar*, 131 F.3d 672, 676 (7th Cir. 1999); *Parsons v. St. Joseph's Hosp*., 70 Wn. App. 804, 810 (1993) (genuine issue of fact regarding employee's performance does not create a fact issue about whether the employer was motivated by discriminatory reasons). In considering the decision of an employer in a personnel action, the appropriate inquiry is not whether the decision is right, but whether it is honest. *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 84, n. 26, 98 P.3d 1222, 1228 (2004), citing *Kariotis*, 131 F.3d 672 at 676.

Here, Boeing had objective evidence that Plaintiff had a medical condition that restricted her to occasional walking, thus, it could not allow her to continue in a job that required frequent walking without risking her safety. Plaintiff can not produce any evidence from which a reasonable fact finder would conclude that Boeing’s non-discriminatory reason for this medical restriction was a pretext. Indeed, Plaintiff can offer no evidence that Boeing based its decision to put her on light duty on anything other than her own medical condition and her doctor’s instructions. Until Boeing received information from Plaintiff’s physician allowing her to return to work, it had no choice but to accommodate Plaintiff by assigning her to light duty. Jeffery Decl. ¶ 14; Wilson Decl. ¶ 11.

3. Plaintiff’s §1981 Claim Fails for the Same Reason as Her RCW 49.60 Claim.

While Plaintiff’s Complaint does not specify any facts supporting her race claim under 42 U.S.C. §1981, the analysis of a 42 U.S.C. § 1981 federal discrimination claim parallels the analysis of a WLAD discrimination claim. Therefore, Plaintiff’s §1981 claim fails for the same reason as her RCW 49.60 claims, set out above.

Specifically, courts apply “the same legal principles as those applicable in a Title VII disparate treatment case” when analyzing an employee's 42 U.S.C. § 1981 claim. *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 850 (9th Cir. 2004); see also *Jurardo v. Eleven-*

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Fifty Corp., 813 F.2d 1406, 1412 (9th Cir. 1987)("facts sufficient to give rise to a Title VII claim are also sufficient for a section 1981 claim"). In turn, the WLAD follows the same principles as Title VII claims. See, e.g. *Oliver v. Pacific Northwest Bell Tel. Co.*, 106 Wn. 2d 675, 678, 724 P.2d 1003 (1986) ("RCW 49.60 [the WLAD] is patterned after Title [VII] . . . [c]onsequently, decisions interpreting the federal act are persuasive authority for the construction of RCW 49.60"). Therefore, the analysis of whether Plaintiff has a cognizable claim under 42 U.S.C. § 1981 is the same as whether she has a claim under the WLAD. As there is no genuine issue of material fact with respect to Plaintiff's claims under the WLAD, Plaintiff's 42 U.S.C. § 1981 claims should also be dismissed.

C. Plaintiff Cannot Establish a Claim of Discrimination Based on Age.

In her Complaint, Plaintiff alleges a violation of the Age Discrimination in Employment Act of 1967 (the "ADEA"). Like Title VII, the ADEA requires a person to file a charge of discrimination with the Equal Employment Opportunity Commission before instituting a civil action for age discrimination. 29 U.S.C. § 626(d); *Sanchez v. Pacific Powder Co.*, 147 F.3d 1097, 1099 (9th Cir. 1998). Ordinarily, the person must file the charge within 180 days of the alleged discriminatory act, or, in some states that have their own age discrimination law and its own enforcement agency (including Washington) the ADEA extends the time to 300 days. 29 U.S.C. § 626(d)(1),29 U.S.C. §§ 626(d)(2), 633(b). Plaintiff did not file such a charge in the time allotted to her, thus, her ADEA claims are barred as a matter of law.

Plaintiff's state law claims of age discrimination pursuant to RCW 49.60 are barred for the same reasons as her race-based state law claims. Namely, Plaintiff cannot demonstrate that her assignment to light duty was an adverse employment action, and cannot identify any other employees who were treated better because of their age. The sum of Plaintiff's testimony regarding age discrimination is that she has a "feeling" that she may be being discriminated against because she has "watched how the younger people have been put in jobs that people her

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age have been doing," and that she believes that Boeing has been sued for age discrimination in other states. Tr. 130:19-131:12. Plaintiff fails to identify a single person younger than she was who was treated more favorably, and, in fact, testified that of the people that she works with "everybody is at the retirement age." Tr. 108:15-19.

D. Plaintiff Can Offer No Proof of Gender Discrimination.

Plaintiff's allegations regarding gender discrimination are similarly unavailing. Plaintiff cannot claim gender discrimination under Title VII, as any such claim would be time barred in the same manner as her Title VII race claim. Further, Plaintiff fails to allege (a) any adverse employment action or (b) any male comparators who were treated more favorably in order to establish a prima facie case of discrimination under RCW 49.60.

In fact, when asked about the basis for her claims of gender discrimination, Plaintiff cannot point to anything specific, stating only that "everything I have told you, I have not seen them do to any man. I just feel like they intimidate women." Tr. 137:11-20. She blames this discrimination on her female supervisors, Ms. Costa and Ms Knighton, and "their peers, which could be male or whatever." Tr. 137:18-138:7. When asked about the identity of the "peers," Plaintiff stated that "I do not know who their peers are." Tr. 138:5-9. When asked near the end of her deposition what conduct she had testified to that was the basis for her claim of gender discrimination, she would reply only "all of it." Tr. 138:19-139:3. These sort of vague allegations are not sufficient to make out a prima facie case of discrimination.

E. Plaintiff Cannot Make Out a Claim of Disability Discrimination.

The sole Americans with Disabilities Act claim in Plaintiff's Complaint is for a violation of Title II, 42 U.S.C. § 12132 . This provision of Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphasis added). The ADA defines a

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"public entity" as "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1). As "public entity" cannot be construed to include Boeing or Ms. Knighton, Plaintiff's ADA claim must be dismissed.

Further, Plaintiff cannot establish a prima facie case of disability discrimination under State law. As explained above in Section V.B.1.a., Plaintiff does not allege an adverse employment action suffered as a result of her inclusion in any protected class, let alone disability. Further, Plaintiff does not, and cannot, identify any other employees who are not disabled who were treated more favorably than she was. Rather, Plaintiff insists that she was *not* disabled and did not need an accommodation. Nevertheless, Plaintiff bases her claim of disability discrimination on the allegation that disabled employees were treated more favorably than she was, because "they were accommodated for disabilities that they had and were able to continue to work their job and I was not." Tr. 118:10-16. In other words, at most, Plaintiff alleges that Boeing provided disabled employees accommodations that she did not want or need.

Moreover, Plaintiff's disability claim should be dismissed because when questioned about her disability claim, Plaintiff stated only that she was treated differently than other people with disabilities *because of her race*. Plaintiff is wholly unable to articulate a claim for disability discrimination, because no such claim exists. Tr. 129:4-9.

F. Defendants Did Not Retaliate Against Plaintiff.

To succeed on a retaliation claim under Washington law[5], Plaintiff must establish: (1) that she engaged in a protected activity, (2) that she was thereafter subjected to adverse employment action by Boeing, and (3) that a causal link exists between the two. *Donahue v. Central Wash. Univ.*, 140 Wn. App. 17, 26, 163 P.3d 801 (2007). As in the above discrimination claims, if Plaintiff can establish the elements of a prima facie case of retaliation, Defendants

[5] Plaintiff does not state that she is claiming retaliation under Title VII, but any such claim would be barred for the same reasons as her other Title VII claims.

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must then present evidence that the basis for the adverse employment action was legitimate and non-retaliatory. Plaintiff must then present evidence that the Defendants' reasons are pretextual. *Milligan v. Thompson*, 110 Wn. App. 628, 638-39, 42 P.3d 418 (2002).

Here, Plaintiff alleges two instances of retaliation that were the result of her filing an EEOC charge. First, she alleges that she was retaliated against by being put on a different barge when she came back from light duty. Tr. 152:3-14. Second, she alleges that she was retaliated against by being transferred to Everett. Tr. 139:6-11.

1. Plaintiff Was Not Subject to an Adverse Employment Action.

Plaintiff cannot establish that either her rotation to a new barge or her transfer to Everett constitute an adverse employment action under Washington law. As stated above in Section V.B.1.a., transferring an employee to an alternate assignment in accordance with an organization's policies is not an adverse action where the employee "was not subject to any permanent loss of pay or benefits, was not demoted or fired, and did not have her job responsibilities permanently altered" as a result of the reassignment. *Tyner,* 137 Wn. App. 545 at 564. Further, inconvenience is insufficient to prove an adverse action. *Tyner*, 137 Wn. App. 545 at 564-65, citing *Kirby*, 124 Wn. App. 454 at 465.

Here, Plaintiff was rotated to a new barge in accordance with Boeing's practice of ensuring that its employees are well rounded and able to perform their responsibilities in all parts of the organization. Then, she was transferred because Renton was downsizing and was in a surplus situation. Neither action resulted in Plaintiff losing a single penny of pay or benefits, she was not demoted or fired, and her job responsibilities remain the same. At most, Plaintiff claims that it was inconvenient to be placed on what she alleges is a "busier" barge, or that she is inconvenienced by having a longer commute to the Everett facility.

Moreover, Plaintiff has not presented and cannot present, sufficient evidence to demonstrate a causal link between her complaints and her rotation and transfer. Plaintiff cannot

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demonstrate that but for engaging in protected activity, she would not have been rotated or transferred. Quite the opposite is true. Independent of Plaintiff's complaints, Boeing had a practice of rotating its employees, and, in fact, Plaintiff had worked on many different barges throughout her career and years before she complained to the EEOC. Moreover, Plaintiff's transfer was the result of a surplus situation, and Everett, not Renton, chose Plaintiff as the transferee. Plaintiff basically argues that her EEOC charge should have allowed her to work the job of her choice at the location of her choice indefinitely, however, that is not Boeing policy or procedure, nor is it the law.

2. Plaintiff Cannot Demonstrate That Boeing's Reasons For Her Rotation and Transfer Were Pretextual.

Plaintiff cannot demonstrate that Boeing's legitimate, nonretaliatory reason for her rotation or transfer are pretextual. Plaintiff has no evidence to contradict the fact that she was rotated and transferred for legitimate, non-discriminatory reasons.

Specifically, as explained above, Wesley Costa rotated Plaintiff off of one barge and onto another pursuant to her manager, Vicki Knighton's, instruction that employees should be rotated periodically to ensure that they were trained in all aspects of their jobs and on different parts of the building cycle. Ms. Costa consequently rotated Plaintiff, who had been rotated before, to another barge doing the exact same job, with the exact same job description and duties. Costa Decl. ¶ 12. Plaintiff's job as an MPRF requires her to be able to perform her duties on any barge, and, in fact, it is her opinion that she did well on both barges. Tr. 139:19-21. Defendant Vicki Knighton had no input into Plaintiff's rotation. Knighton Decl. ¶ 12.

Moreover, Plaintiff's transfer was wholly the result of Boeing entering into a "surplus" situation, whereby certain job codes, including Plaintiff's, were required to reduce their employees. Costa Decl. ¶ 15-16; Knighton Decl. ¶ 13. Boeing's Skills Team, not Plaintiff's managers, sets the policy and procedure of who is chosen for possible transfer during a surplus, and Plaintiff was chosen pursuant to that procedure by Human Resources. Finch Decl. ¶ 11-12.

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The only input that Plaintiff's manager had into Plaintiff's transfer was informing Everett that Plaintiff had knowledge of a inventory procedure that the other candidate did not have; however, Everett still made the ultimate choice to pick Plaintiff as their preferred candidate. Costa Decl. ¶ 21; Finch Decl. ¶ 13. Defendant Vicki Knighton had no input whatsoever into Plaintiff's transfer. Knighton Decl. ¶ 15.

As such, Plaintiff's retaliation claim fails as a matter of law.

G. Plaintiff's Negligence and Emotional Distress Claims Are Preempted by the LMRA.

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 141 et seq. (LMRA) gives federal courts exclusive jurisdiction of lawsuits involving enforcement of collective bargaining agreements. *Textile Workers Union of Am. v. Lincoln Mills of Alabama*, 353 U.S. 448, 450-51, 456 (1957). Where applicable, section 301 completely preempts state law. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). Tort claims, such as Plaintiff's state law claims for emotional distress and negligence in this case, are preempted by the LMRA if "their evaluation is inextricably intertwined with consideration of the terms of the labor contract." *Miller v. AT&T Network Systems*, 850 F.2d 543, 545 (9th Cir. 1988)(internal citations omitted). If a claim is preempted by the LMRA, such a claim is subject to dismissal if the employee "failed to exhaust his contractual grievance procedures under the collective bargaining agreement." *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 646 (9th Cir. 1989) citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965), and *Truex v. Garrett Freightlines, Inc.*, 784 F.2d 1347, 1353 (9th Cir. 1985).

In the Ninth Circuit, it is well settled that the LMRA may preempt claims for both negligent and intentional infliction of emotional distress where the claims require examination of the CBA. See *Miller v. AT&T Network Systems*, 850 F.2d 543, 551 (9th Cir. 1988); *Jackson*, 881 F.2d at 645-46. For example, in *AT&T*, the court affirmed summary judgment based on LMRA preemption because the plaintiff had to show "that the defendant's conduct was outrageous,

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extremely unreasonable, or in some way inappropriate" in order to establish his intentional infliction of emotional distress claim under Oregon law; therefore "the terms of the CBA [could] become relevant in evaluating whether the defendant's behavior was reasonable." *Id.* at 550. Washington imposes a similar burden on a plaintiff. *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998). The Court reached a similar result in *Jackson*, finding preemption and therefore dismissing Jackson's negligent and intentional infliction of emotional distress claims as "the actions relied upon by Jackson require analysis of the collective bargaining agreement," and the Plaintiff failed to exhaust his remedies under the collective bargaining agreement. *Jackson*, 881 F.2d 638 at 645-46.

As in *AT&T* and *Jackson*, all of Plaintiff's negligence and emotional distress claims would require the court to examine numerous provisions of the CBA to determine whether Defendants' actions are outrageous, negligent or wrongful, and are therefore inextricably intertwined with the collective bargaining agreement. *See*, *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 537 (4th Cir. 1991) ("Just as the intentional infliction of emotional distress claim clearly requires interpretation of the collective bargaining agreement to determine whether the alleged conducts was 'outrageous and intolerable,' so do each of the other [negligence] charges require recourse to the agreement to determine whether the alleged conduct was 'negligent' or 'wrongful'"); see also *Bale v. General Telephone Company of California*, 795 F.2d 775, 780 (9th Cir. 1986) (state law claim of negligent misrepresentation preempted by LMRA).

As an initial matter, Plaintiff's CBA governs all grievances or complaints "arising between the Company and its employees . . . with respect to the interpretation or application of any of the terms of this Agreement." Kelly Ex. 1, CBA p. 71. Further, Article 2 of the CBA specifically states that issues with management are subject to the CBA. For example, Section 2.1, titled Management of Company states in relevant part that: "The management of the

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Company and the direction of the workforce is vested exclusively in the Company **subject to the terms of this Agreement**." Kelly Ex. 2, CBA p. 14 (emphasis added). The CBA also governs each and every instance of unfair treatment that Plaintiff complains of in support of her emotional distress and negligence claims:

- Section 6.10 governs the allocation and assignment process for scheduling overtime;
- Section 13.14 gives the Company "sole responsibility for making work assignments;"
- Section 16 governs health and safety in the workplace, including
  - the requirement that "no employee shall be required to perform work that involves an imminent danger to health or physical safety (16.1), and
  - Procedures that an employee must follow regarding medical recommendations, including the removal of medical recommendations. (16.9). This provision grants Boeing Medical full discretion in implementing, removing or modifying any medical recommendation. (16.9(b)(3));
- Section 21.4 governs Nondiscrimination; and
- Article 22 governs Workforce Administration, including the procedures that must be followed during a surplus (Sections 22.2-22.9, and Rules Relating to Lateral Transfers and Reclassifications).

Kelly Ex. 2. All of these provisions are identical or nearly so in the 2005 and 2008 CBAs.[6] Kelly Decl. fns. 1-4.

Finally, if an employee believes that any of the provisions in the CBA have been breached, Article 19 completely and comprehensively governs the employee's recourse. Article

[6] Article 22 is only implicated in the 2008 CBA, as Plaintiff's transfer occurred in 2009.

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19, Grievance Procedure and Arbitration. Kelly Ex. 1, CBA pp. 71-72. Article 19 provides a step by step analysis for the grievance procedure and employees' rights and responsibilities regarding that procedure.

Here, plaintiff's negligence and emotional distress claims are solely based on the conduct or actions that she identified in her Complaint and deposition (*i.e.*, her medical restrictions, her assignment to light duty, her assignment to a different barge, her lack of overtime, and her transfer to Everett), each and every one of which is addressed by one of the above-listed provisions in her CBA. As such, her negligence and emotional distress claim are "intertwined" with the CBA, as the Court would need to consider the provisions of the CBA in deciding if Defendants' alleged conduct was outrageous, wrongful or negligent. Thus, Plaintiff's negligence and emotional distress claims are preempted by the LMRA.

Plaintiff admits that she knew that there was a grievance procedure in place, and she testified that "[b]ecasue I'm a union employee I took everything to my union." Tr. 37:19-25, 38:21-39:2. In fact, Plaintiff testified that she believed her union filed a grievance on her behalf regarding her placement on light duty, Tr. 39:11-25; 147:9-148:4; 150:18-22, and also grieved her transfer to Everett. Tr. 134:9-22. While Plaintiff may have believed that to be true, there is no evidence her union filed any grievance about either of those concerns, or any other concerns. Kelly Decl. ¶ 8-9. As Plaintiff cannot show that she exhausted her remedies under the CBA, Defendants are entitled to summary judgment on Plaintiff's emotional distress and negligence claims. See *Jackson*, 881 F.2d 638 at 646.

VI. CONCLUSION

For the foregoing reasons, Plaintiff's claims should be summarily dismissed.

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August 3, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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